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In The Supreme Court Of The United States

OCTOBER TERM, 1993

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; GILBERT K. DAVIS, individually and as a partner of Davis, Gillenwater & Lynch,

Petitioners,

v.

JAMES H. TURNER, Trustee, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER BANKRUPTCY COURTS LACK JURISDICTION OF LIQUIDATION PROCEEDINGS UNDER THE SECURITIES INVESTOR PROTECTION ACT (15 U.S.C. § 78aaa, et seq.)?

II. WHETHER PETITIONERS, BY HAVING FACTUAL ISSUES RESOLVED BY A NON-ARTICLE III JUDGE AND REVIEWED ON A CLEARLY ERRONEOUS STANDARD BY THE DISTRICT COURT, WERE UNCONSTITUTIONALLY DEPRIVED OF AN OPPORTUNITY TO HAVE THEIR CASE HEARD DE NOVO BY AN ARTICLE III JUDGE WHERE THEIR CLAIM INVOLVES A "PRIVATE RIGHT" UNDER GRANFINANCIERA, S.A. v. NORDBERG, 492 U.S. 33 (1989)?

A. WHETHER THE TENTH CIRCUIT'S HOLDING THAT "NOTWITHSTANDING THE FACT THAT PREFERENTIAL AND FRAUDULENT TRANSFER PROCEEDINGS MAY INVOLVE PRIVATE RIGHTS . . . THE BANKRUPTCY COURT HAD JURISDICTION UNDER ARTICLE III TO ADJUDICATE THE TRUSTEE'S SUIT" IS AT ODDS WITH THIS COURT'S DECISION IN GRANFINANCIERA, S.A. v. NORDBERG, 492 U.S. 33, 54 (1989) AND REFLECTS CONFUSION AMONG THE CIRCUITS ON THIS QUESTION?

B. WHETHER PETITIONERS' FILING OF A SIPA PROOF OF CLAIM FOR ATTORNEY'S FEES STRIPS THEM OF THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR CASE HEARD BEFORE AN ARTICLE III JUDGE?

PARTIES TO THE PROCEEDINGS

The following are all of the parties to the proceedings:

1. James H. Turner, Trustee
2. Davis Gillenwater & Lynch, a Partnership
3. Gilbert K. Davis
4. O'Connor & Hannon, a partnership
5. Securities Investment Protection Corporation

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IN THE SUPREME COURT OF THE
UNITED STATES

In re INVESTMENT BANKERS, INC., Debtor.

DAVIS, GILLENWATER & LYNCH; GILBERT K. DAVIS, individually and as a partner of Davis, Gillenwater & Lynch,

v. Petitioners,

JAMES H. TURNER, Trustee, et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals to the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Gilbert K. Davis and Davis, Gillenwater and Lynch, the petitioners herein, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case, on September 17, 1993.

M#191012

OPINIONS BELOW

The September 17, 1993 opinion of the Court of Appeals whose judgment is herein sought to be reviewed, is reported at 4 F.3d 1556 (1993) and is re-printed in the appendix to this petition at pages A1 - A50. The prior opinion of the United States District Court for the District of Colorado was entered May 15, 1990 and is reported at 136 B.R. 1008 (Dist. Colo. 1989) and is reprinted in the appendix to this petition at pages A51 - A114. The unpublished decision of the bankruptcy judge, which was reversed by the above decisions on the issue of jurisdiction, was issued on December 10, 1985, and is reprinted in the appendix to this petition at pages A115 - A165.

STATEMENT OF JURISDICTION

The judgment of The Court of Appeals was entered on September 17, 1993. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED.

Provisions of law which are involved in this case:

1. Article III of the United States Constitution;
2. Seventh Amendment to the United States Constitution;
3. 15 U.S.C. § 78aaa et seq;
4. Section 115 of the Bankruptcy Amendments and Federal Judgeships Act of 1984;
5. 28 U.S.C. § 157;
6. 28 U.S.C. § 1334;

7. Bankruptcy Rule 8013;

8. 11. U.S.C. § 329.

These constitutional provisions and statutes are reprinted in relevant part in the appendix to this petition at pages A166-A179.

STATEMENT OF THE CASE

This petition involves a broker dealer liquidation case which presents the questions of whether bankruptcy judges have jurisdiction to hear claims arising out of the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa, et seq., and whether the petitioners were entitled to have their case, involving "private rights," heard by an Article III tribunal rather than merely upheld by an Article III court under a clearly erroneous standard of review. On July 10, 1981 the Securities Investment Protection Corporation ("SIPC") filed a complaint in the United States District Court

for liquidation of the broker/dealer, Investment Banker, Inc. The liquidation proceeding was removed to the United States District Court for the District of Colorado on July 15, 1981, pursuant to § 5-B-4 of SIPA, 15 U.S.C. § 78eee(b)(4). After the case was removed to the United States Bankruptcy Court for the District of Colorado, the trustee, Turner, filed a complaint in the bankruptcy court seeking to avoid the transfer of two checks to the law firm of Davis, Gillenwater & Lynch. The disputed checks were: Check #13417 dated July 10, 1981 to Gilbert K. Davis, in the amount of $11,858.00 and check #13432 dated July 10, 1981 payable to Gilbert K. Davis of Davis, Gillenwater & Lynch in the amount of $25,000.00.

The petitioners appeared in the bankruptcy court and asserted at the time of

trial in July, 1984 that after the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), the bankruptcy courts had no jurisdiction over broker/dealer liquidation proceedings under SIPA because the provisions of BAFJA placed jurisdiction of such actions in the district court. Petitioners also argued that permitting a non-Article III judge to adjudicate matters involving preferences and fraudulent transfers was unconstitutional.

The bankruptcy judge agreed with the petitioners in determining that bankruptcy courts did not have jurisdiction under SIPA to conduct liquidations of broker/dealers. This opinion appears at A115 - A165. In the bankruptcy judge's decision, oddly enough, he set out the findings of fact he would have made had he possessed jurisdiction to decide

the matter. A151 - A164. These findings were adverse to petitioners.

The trustee and SIPC appealed the bankruptcy court's opinion to the district court which reversed the bankruptcy judge's finding that he did not have jurisdiction over liquidations under SIPA. The district court "upheld" the factual determinations of the bankruptcy judge under the "clearly erroneous" standard of review.[1] The petitioners ultimately appealed to the Court of Appeals for the Tenth Circuit which affirmed the decision of the district court by opinion of September 17, 1993.

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[1] The case was remanded for additional determinations (involving pre-judgment interest) which are not relevant to this petition. See A106 - A114, and A12 - A13.

REASONS FOR GRANTING THE WRIT

Summary of Argument

I. There has been no legislative action to invest bankruptcy judges with jurisdiction of SIPA matters. SIPA, by its own terms, states that liquidation proceedings under that statute are to proceed in the federal court "having jurisdiction over cases under Title 11." 15 U.S.C. § 78eee(b)(4). Under BAFJA, the district courts have original and exclusive jurisdiction of cases under Title 11. 28 U.S.C. § 1334. Moreover, under 28 U.S.C. § 157, district courts only have authority to refer to the bankruptcy judges for the district "cases under Title 11, and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11." 28 U.S.C. § 157. Title 15 SIPA cases simply do not fall into any of these

categories and are outside the scope of cases or proceedings which may be referred to bankruptcy judges.

The appellate courts found the literal interpretation of Congress' legislation to be an "absurd" result, and held that bankruptcy judges could hear and determine Title 15 SIPA actions. In so ruling these courts improperly permit "private rights" of petitioners under Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989), to be adjudicated by non-Article III judges on a wholesale basis. The decision appealed from runs counter to this Court's ruling in Granfinanciera, counter to Article III of the Constitution, and is in clear conflict with the statutory language which places Title 15 matters within the aegis of district courts.

II. Petitioners were denied the opportunity to be heard by an Article III

judge despite the fact that this case, under Granfinanciera, involves "private rights." Just as Congress could not eliminate a litigant's Seventh Amendment right to trial by jury in an action at law to recover a fraudulent conveyance by classifying the proceeding as core, Congress cannot deny petitioners here their Constitutional right to an adjudication by an Article III judge through the same process. Adjudication of a core proceeding by a bankruptcy judge, subject to the "clearly erroneous" standard of review at the district court level, is not an adjudication by an Article III judge.

In devising a system by which findings of a non-Article III judge involving "private rights" are reviewed by an Article III court under the "clearly erroneous" standard of

review, Congress has denied petitioners Constitutional protections under Article III. The various Courts of Appeals, even in light of this Court's decision in Granfinanciera, are reaching conflicting conclusions on the constitutionality of the bankruptcy judges' authority to adjudicate private rights. These conflicting views are creating confusion for litigants and the courts in attempting to determine the extent to which a non-Article III tribunal can adjudicate matters of private rights. This Court should grant this writ to resolve this issue.

ARGUMENT

I. BANKRUPTCY COURTS LACK JURISDICTION OF LIQUIDATION PROCEEDINGS UNDER THE SECURITIES INVESTOR PROTECTION ACT (15 U.S.C. § 78aaa et seq.).

A. Congress has not Provided any Statutory Basis for Conferring Jurisdiction of Title 15 Litigation upon Bankruptcy Judges.

The Bankruptcy Judge, in analyzing whether he had jurisdiction to hear Title 15 SIPA matters, properly observed:

> There has been no legislative action to invest bankruptcy judges with any jurisdiction over SIPA matters. . . . The reference authority set forth in 28 U.S.C. § 157 only refer[s] title 11 matters to bankruptcy judges.

A142. A review of relevant statutes confirms this conclusion.

The statute at the center of the controversy below is the Securities Investor Protection Act ("SIPA") which was enacted in 1970 to protect individual investors from financial hardship and other related problems. Under Section 78eee of the act as originally enacted, a SIPA liquidation was commenced by the filing of an application for

a customer protective decree in the Federal district court. Upon filing, the district court acquired exclusive jurisdiction over the debtor and its property. The 1970 Act further provided that the case would be removed to the bankruptcy court in the event of a trustee's appointment.

SIPA predated the Bankruptcy Reform Act of 1978, which completely overhauled the bankruptcy system. Under the Bankruptcy Reform Act of 1978, bankruptcy courts were created which were separate from district courts and adjuncts thereto. These newly created bankruptcy courts, which were presided over by non-Article III judges, were granted exclusive jurisdiction over bankruptcy matters.[2] As a result of the wholesale overhaul of the bankruptcy system

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[2] See Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53-54 & n.3 (1982).

in 1978, a substantial change was necessitated in the manner by which SIPA liquidations were referred. The Bankruptcy Reform Act of 1978 made significant changes in SIPA to conform it to the new bankruptcy system.

The Securities Investor Protection Act of 1970 had contained numerous cross references to the Bankruptcy Act which governed bankruptcy prior to 1978. Section 308 of the Bankruptcy Reform Act of 1978 included some fifteen changes in cross references to the old Bankruptcy Act in order to conform SIPA to the changes in Title 28 and the newly proposed Title 11 of the United States Code. One such 1978 change altered the cross reference in SIPA to the courts then handling bankruptcy cases in the pre-1978 system to the newly created courts that

would have jurisdiction of bankruptcy cases under the new 1978 code.

This appears as Section 78eee(b)(4) of SIPA in the 1978 legislation, and reads as follows:

> Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this chapter upon the court to which application for the issuance of the protective decree was made. (Emphasis added.)

The statute, therefore, as amended in 1978, granted jurisdiction over SIPA cases to the courts having jurisdiction over cases under Title 11. (The new Bankruptcy Code.)

In 1982, this Court declared the jurisdictional provisions of the 1978 Bankruptcy Reform Act to be unconstitutional.

Marathon, 458 U.S. 50 (1982). Revision of the Act's Title 28 provisions was indicated. It took Congress two years to do this and the legislative product, known as BAFJA, enacted July 10, 1984, was passed as a floor amendment and did not go through the careful Committee process appropriate to major legislation. Consequently, its legislative history is very limited.

BAFJA did not contain the extensive cross reference provisions found in its 1978 predecessor. For whatever reason, BAFJA did not discuss or cross reference SIPA. The provision in SIPA (15 U.S.C. § 78eee(b)(4)) requiring removal to the court "having jurisdiction over cases under Title 11" remained as before. Congress however elected in BAFJA to address bankruptcy jurisdiction in 28 U.S.C. § 1334 as follows:

> Except as provided in Subsection (b) of this Section, the district courts shall have original and exclusive jurisdiction of all cases under Title 11. (Emphasis added.)

BAFJA dismantled the unconstitutional 1978 bankruptcy court system. Indeed, the bankruptcy court which was created in the 1978 Act was abolished by BAFJA and the former bankruptcy courts became a "unit" of the district court to which they were attached. 28 U.S.C. § 151.

These changes had an obvious impact on pending and future cases involving Title 15 SIPA claims.[3] Significantly, the 1984

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[3] The initial pleading in this litigation was filed in January, 1982, which was while the BAFJA abolished court system was still in effect. The Complaint specifically recited that jurisdiction arose under 28 U.S.C. 1471, which was repealed by BAFJA, and replaced by amended 28 U.S.C. 1334. When the 1984 amendments became effective, provisions were necessary to take care of cases, like this one, then pending in the court to be abolished. Section 115 of BAFJA endeavored to transfer all pending

(continued...)

amendments, having provided for the elimination of the unconstitutional bankruptcy courts, required transfer of cases pending in the now defunct courts to the district court, and placed jurisdiction of all future Title 11 cases in the district courts.

BAFJA did provide a means by which district courts could refer proper matters to bankruptcy judges. Notably, however, Congress provided no mechanism by which a Title 15 SIPA case could be referred to or heard by a bankruptcy judge under the 1984 amendments. Under BAFJA, Congress enacted 28 U.S.C. § 157 to provide the procedure for referral of bankruptcy cases and proceedings from the district courts to the bankruptcy

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[3](...continued)
cases to the district courts. Section 115 can be found at pages A168 - A170 of the Appendix.

judges for the district. Section 157 provides as follows:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under § 158 of this title.

Simply put, the only matters which a bankruptcy judge is permitted to hear under BAFJA are those cases referred to the judge by the district court under Title 11 or those proceedings arising under Title 11 or arising in or related to a case under Title 11. Title 15 SIPA cases and proceedings simply do not fall into these categories.

The Bankruptcy Judge in this proceeding, in analyzing Title 15 SIPA actions, succinctly and properly observed:

> SIPA matters are not "cases under title 11" and are not proceedings "arising under" or "arising in or related to a case" under title 11. SIPA matters arise under the Securities Investor Protection Act, 15 U.S.C. § 78aaa, et seq. It can readily be seen that the Securities Investor Protection Act is not a title 11 matter. It is a title 15 matter. Further, I can not construe title 15 matters to be "related to" title 11 cases.

A140. This result is reinforced by the fact that, under § 78eee(b)(4), SIPA cases are removed to the court having "jurisdiction over cases under Title 11". Under 28 U.S.C. § 1334, the courts having jurisdiction over cases under Title 11 are the district courts. In short, as the Bankruptcy Court concluded,

> a literal construction of § 78eee(b)(4) of the SIPA and § 157 of the BAFJA must necessarily result in depriving bankruptcy judges of any authority or jurisdiction to decide anything under a SIPA proceeding. There is simply no presently existing statutory authority for removal of a SIPA case from the district court to a bankruptcy judge.

A142.

The appellate courts concluded, however, that a literal interpretation of the statutes would undercut perceived Congressional intent. The simple response to the analysis crafted by those courts is that statutory construction is unnecessary and inappropriate in this case. Resort to legislative history is only proper where the language of a statute is unclear. Blum v. Stenson, 465 U.S. 886, 896 (1984). Where statutory language is clear, reliance upon committee reports, legislative comments, and the like is outside the scope of proper review. There

is no ambiguity in the language of the statutes here under review with respect to whether bankruptcy courts have jurisdiction over liquidation proceedings under Title 15.

Neither 28 U.S.C. § 1334, 28 U.S.C. § 157 nor 15 U.S.C. § 78eee(b)(4) speak in terms of conferring jurisdiction of Title 15 cases on the bankruptcy courts as they were constituted in 1984. As the bankruptcy court concluded:

> only title 11 cases and matters relating to, or arising in or out of title 11 cases may be referred to bankruptcy judges under legislation promulgated by the Congress. Had Congress desired to include title 15 matters in the legislative reference allowance, it only needed to include a sentence in 28 U.S.C. § 157 so providing.

A144.

Ultimately, respondents convinced the appellate courts below that the literal language used by Congress, which fails to confer bankruptcy judges with jurisdiction

over SIPA cases, must be rejected because it would lead to "absurd" results. The result which the Tenth Circuit found unpalatable is that 15 U.S.C. § 78eee(b)(4) speaks in terms of "removal" of a liquidation proceeding from the district court "to the court of the United States in the same judicial district having jurisdiction over cases under Title 11." In light of 28 U.S.C. § 157, the Court of Appeals determined that it is "absurd" for a district court to remove a case to itself. 4 F.3d at 1564; A 34.

The cause of the confusion is the interplay between the 1984 BAFJA amendments and SIPA, which is discussed at length above. Simply put, SIPA's § 78eee(b)(4) has been overtaken by events. There is no provision in 28 U.S.C. § 157 allowing the district court to refer cases that arise under 15 U.S.C. § 78aaa et seq, to a bankruptcy court.

The 1984 BAFJA amendments limit the matters a district court can refer to a bankruptcy judge to "all cases under Title 11 and any and all proceedings arising under Title 11, or arising in or relating to a case under Title 11."[4] Indeed, under BAFJA the separate and distinct (and unconstitutional)

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[4] Hence, the result advanced by respondents (and ultimately adopted by the Tenth Circuit) makes no practical sense as the bankruptcy judge determined:

> To uphold the SIPC's line of reasoning on this issue would result in conferring jurisdiction in the bankruptcy judges over title 15 matters by way of removal "to the court of the United States. . . having jurisdiction over cases under Title 11" [78eee(b)(4)] when bankruptcy judges do not even have jurisdiction over the cases under Title 11. This, too, is an absurd result.

A143 - A144. (Citation omitted.)

"bankruptcy courts" created by the 1978 Bankruptcy Act, and contemplated in § 78eee(b)(4), no longer exist and are, therefore, unavailable to assume jurisdiction over SIPA matters. Accordingly, after the 1984 BAFJA amendments, any concern voiced by the Tenth Circuit that it is absurd under § 78eee(b)(4) for a district court to "remove" a case to itself is anachronistic. Even a "removal" to a bankruptcy judge would now occur within a "unit" of the same district court.[5]

In enacting BAFJA, Congress, for whatever reason, chose not to include SIPA

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[5] If a "transfer" results in the same court having jurisdiction, that is no reason to rewrite either SIPA or bankruptcy legislation. Indeed, the internal "transfer" of a case within a single judicial entity is hardly an "absurd" circumstance. Such a transfer often occurs in jurisdictions which have preserved law and equity practice such that a transfer from one side of the court to the other frequently becomes necessary.

within the class of cases which could be heard by bankruptcy judges. And what respondents' "absurdity argument" repeatedly fails to address is that neither BAFJA nor SIPA expressly or impliedly give bankruptcy courts jurisdiction over Title 15 cases. Even if the language of SIPA supported respondents' suggestion that jurisdiction of Title 15 liquidations is conferred on bankruptcy judges, any alleged conflict between the pre-1984 SIPA and the 1984 BAFJA must be resolved by permitting the latter statute to prevail. Watt v. Alaska, 451 U.S. 259, 267 (1981); 12B Singer, Sutherland on Statutes and Statutory Construction § 51.02 (5th ed. 1992).

BAFJA, the latter-enacted statute, is notable for its clear pronouncement that bankruptcy judges' jurisdiction is limited to Title 11 cases or those related to or arising

in a case under Title 11. Congress did not give district courts the power or the authority to refer cases arising under Title 15 to bankruptcy judges. As this Court has stated in several recent cases, "the fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." Union Bank v. Wolas, 502 U.S. ____, 112 S.Ct. 527, 531 (1992); Toibb v. Radloff, 501 U.S. ___, 111 S.Ct. 2197 (1991).

It must be presumed that Congress recognized after Marathon that there would be jurisdictional challenges to allowing bankruptcy courts to adjudicate securities matters. Congress' decision to reserve jurisdiction of Title 15 matters in Article III courts should not be "relegislated" by judicial fiat. Particularly is this so where

such a broad reading of congressional "intent" would do violence to prior decisions of this Court.

B. Statutes are to Be Construed as Constitutional Where Possible; To the Extent That Respondents' Reading of the Relevant Statutes Would Provide Bankruptcy Judges With Jurisdiction Over SIPA Claims, Their Interpretation is in Direct Conflict with the Constitution and the Prior Decisions of this Court and Must Be Rejected.

If the respondents are correct and Title 15 SIPA claims are matters for adjudication by a bankruptcy judge, then various protections guaranteed by the Constitution, and upheld by this Court in Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989) become dust in the wind. SIPA claims, such as those at issue here, often involve "private rights" within the meaning of Granfinanciera. As such, this Court specifically has held that litigants have a right to have such matters

resolved by juries and in Article III courts. 492 U.S. at 54-55. Yet under respondents' analysis, Congress somehow intended these matters to be swept into bankruptcy courts and decided by bankruptcy judges notwithstanding the unconstitutional consequences of such a result. Indeed, if Congress had expressly intended to deprive SIPA litigants of their rights to trial by jury and adjudication of "private rights" by an Article III judge, it could not do so. Granfinanciera, 492 U.S. at 54-55. Where Congress has not expressly placed Title 15 SIPA matters within the jurisdiction of bankruptcy judges, the courts ought not presume a Congressional intent that would do violence to well-settled constitutional protections.

Indeed, under well-settled rules of statutory construction, it is presumed that

Congressional enactments were intended to be consistent with the Constitution. Buttfield v. Stranahan, 192 U.S. 470, 492 (1903); DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568, 575 (1988); 12A Sutherland Statutory Construction, supra, Statutes § 45.11. Statutes are to be construed to avoid doubts as to their constitutionality. Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. ___, 113 S.Ct. 2264, 2283 (1993); Crowell v. Benson, 285 U.S. 22, 62 (1932); 12A United States Supreme Court Digest, Statutes, §§ 107-108 (Lawyers ed. 1992). Certainly, where there are two interpretations of a statute and one creates concern as to the act's constitutionality, the other interpretation

should be employed. Id.; DeBartolo Corp., 485 U.S. at 575.

The bankruptcy judge correctly decided below that he lacked jurisdiction to hear SIPA matters. The appellate courts below crafted a grant of jurisdiction to avoid a perceived "absurd" result. 4 F.3d at 1564; A34 - A40. But the result they achieved is more problematic than the one they sought to avoid: it runs afoul of the Constitution and the prior decisions of this Court. Certiorari should be granted to resolve this question of far-reaching jurisdictional importance in the federal court system.

II. PETITIONERS, BY HAVING FACTUAL ISSUES RESOLVED BY A NON-ARTICLE III JUDGE AND REVIEWED UNDER A CLEARLY ERRONEOUS STANDARD BY THE DISTRICT COURT, WERE UNCONSTITUTIONALLY DEPRIVED OF AN OPPORTUNITY TO HAVE THEIR CASE HEARD DE NOVO BY AN ARTICLE III JUDGE WHERE THE CLAIM INVOLVES A "PRIVATE RIGHT" UNDER GRANFINANCIERA, S.A. V. NORDBERG, 492 U.S. 33 (1989).

A. Petitioners were Entitled to Have an Article III Judge Hear and Determine Their Case Involving Their Private Rights.

Article III of the Constitution provides that the judicial power of the United States may be exercised only by judges appointed for life with compensation that cannot be diminished during their time in office. A166. The Good Behavior Clause and the Compensation Clause, as these are called, were incorporated in the Constitution to ensure the independence of the judiciary, which is fundamental to our American system of justice. This independent judiciary was celebrated and extensively discussed in The Federalist Papers as a great protection for the American people.

When Chief Justice John Marshall at age 74 rose at the Constitutional Convention of Virginia in 1829 to defend the concept of an

independent judiciary in Virginia, he had been Chief Justice for 28 years and the law had been his life for over half a century. When he spoke "of the independence of all those who try causes between man and man and between man and his government," he spoke with conviction. Chief Justice Marshall stated:

> I have always thought from my earliest youth till now that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary.

L. Baker, John Marshall. A Life in Law, p. 713 (MacMillan Publishing Co., Inc. 1974).

Justice Brennan more recently stated in Marathon:

> [O]ur Constitution unambiguously enunciates a fundamental principle - that the judicial power of the United States must be reposed in an independent judiciary. It commands that the independence of the judiciary be jealously guarded and it provides

> clear institutional protections for that independence.

458 U.S. at 60. Nothing is more clear in the Constitution of the United States than the right of American citizens to have their causes adjudicated in the Federal courts by an independent judiciary.

At the same time, the constitutional history of the United States bankruptcy court system is best characterized as a tug of war between Congress and the Supreme Court over that independence: a Congress, anxious to give the courts of bankruptcy the maximum powers consistent with an efficient bankruptcy court system but unwilling to staff the system with the independent judges required by Article III; and a Supreme Court, sensitive to the independence required by Article III, and reluctant to compromise it. This petition revisits the tension between Congress' efforts to have legal disputes

resolved expeditiously and the Constitution's guarantee to citizens that their private rights will be adjudicated by independent, Article III judges. Here, petitioners were denied the opportunity to present their case to an Article III judge. The question is whether adjudication of petitioners' private rights by a non-Article III judge under the circumstances of this case can pass Constitutional muster.

As enunciated by Justice Brennan, writing for the plurality, in Marathon, 458 U.S. at 70, there are three narrow exceptions to Article III which permit judicial power to be exercised by judges not appointed under Article III: Territorial Courts, Military Courts, and cases involving public rights. In discussing these exceptions to Article III Justice Brennan noted that only in these three instances "has the [Supreme] Court

declined to hold the authority of Congress subject to the general prescriptions of Article III." None of these exceptions apply to the instant case.

In Atlas Roofing v. OSHRC, 430 U.S. 442 (1977), this Court discussed the distinction between proceedings involving "public rights" (in which the Article III requirement is relaxed) vis-a-vis those involving "private rights" (in which the Article III requirement remains in force.) Subsequently, in Granfinanciera, S.A., et al. v. Nordberg, 492 U.S. 33 (1989) this Court ruled that an action to avoid an allegedly fraudulent conveyance under 11 U.S.C. § 548 is a private right and not a public right. In analyzing the history of a right to trial by jury in Granfinanciera, this Court also concluded that an action to avoid an alleged preferential transfer is also a private right

and not in the nature of a public right. As this Court stated,

> although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions. 492 U.S. at 55. (Emphasis added.)
>
> * * *
>
> . . . if a statutory cause of action such as respondent's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III Court lacking the "essential attributes of the judicial power." 492 U.S. at 53. (Emphasis added.)

The decision of this Court in Granfinanciera establishes conclusively that a matter involving private rights ought not be adjudicated in a non-Article III Court; and that actions (such as those at issue here) to avoid an allegedly preferential

transfer or allegedly fraudulent conveyance are adjudications of "private rights." Using these principles as a starting point, it becomes clear that 28 U.S.C. § 157 as applied to this case denies petitioners their Constitutional right to be heard de novo by an Article III judge.

Here, petitioners were denied their right to an Article III adjudication of their private rights by the lower courts' treatment of this proceeding to avoid an allegedly fraudulent conveyance and an alleged preferential transfer as if it were a core proceeding. Under the statutory scheme for jurisdiction of the bankruptcy courts, a bankruptcy court may "hear and determine" (i.e., enter final judgment in) a core proceeding, subject to appeal to the district court. The standard for review, however, by the district court of findings of fact by the

bankruptcy court in such cases is set forth in Bankruptcy Rule 8013, as follows:

> Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Even though proceedings to determine, avoid or recover preferences and fraudulent conveyances are by statute identified as "core proceedings," such proceedings are, as outlined above, matters of private right, subject to adjudication by an Article III court. Granfinanciera, 492 U.S. at 53. Just as Congress could not eliminate a litigant's Seventh Amendment right to trial by jury in an action at law to recover a fraudulent conveyance by classifying the proceeding as core, Congress cannot deny petitioners here their Constitutional right to an adjudication by an Article III tribunal by classifying these proceedings to recover a fraudulent

conveyance and a preferential transfer as core proceedings. Adjudication of a core proceeding by a bankruptcy judge, subject to the "clearly erroneous" standard of review at the district court level, is not an adjudication by an Article III judge.

In devising a system by which an Article III court merely reviews the findings of a non-Article III court using the "clearly erroneous" standard of review, Congress has denied petitioners Constitutional protections under Article III. This deprivation cannot be glossed over:

> . . . the Constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level.

Marathon, 458 U.S. at 86, n.39.

These protections are of particular importance in the instant case in which the bankruptcy judge made numerous and lengthy findings of fact. A151 - A164. These findings were upheld simply on the basis that they were not "clearly erroneous." A14 - A15. Petitioners were entitled to have credibility issues and questions of fact judged first-hand by an Article III judge rather than by a bankruptcy judge. They have instead received only a second-hand determination by an Article III judge applying the clearly erroneous standard. Manifestly, this is less than the Constitution requires.

Moreover, this is not an isolated incident. The Courts of Appeals, even in light of this Court's decision in Granfinanciera, are reaching conflicting conclusions on the constitutionality of the

private rights arising out of core proceedings. These conflicting views are creating confusion for litigants and the courts in attempting to determine the extent to which a non-Article III tribunal can adjudicate matters of private rights.

For example, the Court of Appeals in the instant case has concluded that bankruptcy courts have authority under Article III to hear fraudulent conveyance actions. The Court of Appeals then goes on to state that "[o]ther courts have similarly concluded that the bankruptcy courts have authority to preside over preferential and fraudulent transfer proceedings." 4 F.3d at 1561; A21 - A22. This conclusion is not one easily reached.

In support of this proposition, the Court of Appeals cites, inter alia, to In re Mankin, 823 F.2d 1296 (9th Cir. 1987) cert.

denied, 485 U.S. 1006 (1988). In that case, the Ninth Circuit upheld the jurisdiction of the bankruptcy court to avoid an allegedly fraudulent conveyance because, in its pre-Granfinanciera judgment, the designation of a fraudulent conveyance as a core proceeding was justified. Significantly, the In re Mankin court noted that its finding of bankruptcy court jurisdiction in a fraudulent conveyance action would be altered if the restructuring of debtor-creditor relations is not a public right.

> Of course the fact that this suit has properly been designated as a core proceeding would not justify the Bankruptcy Court's jurisdiction over the matter if we were to find that . . . restructuring of debtor-creditor relations is not a public right.

823 F.2d at 1307. It is therefore logical that the Ninth Circuit would have held differently in light of this Court's holding in Granfinanciera, that fraudulent conveyance

actions are matters involving private rights. Granfinanciera, 492 U.S. at 55.[6]

In contrast to the Tenth Circuit's opinion below, the Second Circuit Court of Appeals recognized that matters of private rights must be tried under the auspices of an Article III court. In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1993) (holding that the adjudication of a contract provision was a state law action which is to be adjudicated by an Article III court).[7]

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[6] However, in In re Intl Nutronics, 3 F.3d 306, 310 (9th Cir. 1993) that Court suggested that the core/non core distinction is determinative in that it "ensures that the bankruptcy courts will not encroach impermissibly in the province reserved by the Constitution to Article III courts."

[7] But the Second Circuit appears irresolute on this issue. See In re Ben Cooper, Inc., 896 F.2d 1394, 1403 (2nd Cir. 1990) (in which the Court assumed, "for the sake of this appeal that § 157(b) passes muster under Article III," as a predicate to holding that jury trials in core proceedings in the bankruptcy court do not violate Article III).

The Tenth Circuit, in the case at issue, which was decided on the same day as In re Orion Pictures Corp., held that the bankruptcy court had jurisdiction under Article III to adjudicate the action, "notwithstanding the fact that . . . fraudulent transfer proceedings may involve private rights. . . " In re Investment Bankers, Inc., 4 F.3d at 1562; A22. Still other Courts of Appeals have reached similar conclusions. See, e.g., In re Arnold Print Works, Inc., 815 F.2d 165 (1st Cir. 1987)(upholding bankruptcy court jurisdiction to hear a breach of contract claim because it was held to be a core proceeding).

The frustration resulting from the confusion among the Circuit Courts of Appeals is reflected by the Eleventh Circuit in the case of In re Davis, 899 F.2d 1136, 1140, n.9. (11th Cir. 1990) cert. denied, 498 U.S.

981 (1991). The In re Davis opinion suggests that "the assumption underlying the 1984 amendments is that Article III is not violated by the resolution of core bankruptcy proceedings in the non-Article III bankruptcy courts." In re Davis at 1140. However, the Court observes "[t]hat assumption is open to serious question," Id. at 1140, n.9, and goes on to provide the following discussion of cases illustrating the widespread confusion which exists regarding whether private right claims must be adjudicated by an Article III court:

> While Supreme Court dicta in two cases following Northern Pipeline seemed to take a narrow view of that decision, see Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584, 105 S.Ct. 3325, 3334, 87 L.Ed.2d 409 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851-53, 106 S.Ct. 3245, 3256-58, 92 L.Ed.2d 675 (1986), the Court's more recent decision in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989),

appeared to adopt the analysis of the Northern Pipeline plurality, and cast doubt on the constitutionality of the bankruptcy courts' authority, under § 157(b), to adjudicate certain "core" proceedings without the parties' consent. Granfinanciera held that a defendant who has not submitted a claim against a bankruptcy estate has a Seventh Amendment right to jury trial in a fraudulent-conveyance action brought by a trustee. The Court also strongly suggested - although it specifically avoided holding - that fraudulent-conveyance and voidable-preference actions under 11 U.S.C.A. §§ 547-548 are "private-right" claims which "must be tried under the auspices of an Article III court." 109 S.Ct. at 2796; see generally id. at 2794-98, 2802. The Courts of Appeals have generally held to the contrary. In re Davis at 1140, n.9.[8]

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[8] In light of these differing opinions the In re Davis court must have felt relief that it did not need to enter this quagmire of conflicting opinions and could instead state that "[t]his difficult issue is not raised in this case, and so, of course, we express no view as to is merits." In re Davis at 1140, n.9.

The case at issue presents an opportunity for this Court to resolve the question of whether Congress, by classifying a claim involving private rights as a core proceeding, can circumvent the requirement that such claims are to be adjudicated by a tenured judge under Article III of the Constitution.

B. By Filing a SIPA Proof of Claim with a SIPA Trustee, Petitioners did not Subject Themselves to a Title 11 Claims Allowance Process, and in Any Event, They Remain Entitled to an Article III Adjudication of Their Private Rights.

1. A SIPA Proof of Claim is Functionally Distinct from a Proof of Claim Under Title 11.

The respondents persuaded the appellate courts below that the written claim filed by petitioners with the SIPA trustee somehow operated as consent by petitioners to the jurisdiction of the bankruptcy court. 4 F.3d

at 1561; A22. This conclusion overlooks the important differences between a SIPA claim and a more formal Title 11 proof of claim.[9]

Section 78fff-2(a) of SIPA governs the filing of a SIPA statement of claim. Section 78fff-2(a)(1) provides that notice of a Title 15 SIPA proceeding is given by the SIPA trustee and not by the bankruptcy court. By contrast, pursuant to Bankruptcy Rule 2002(f), notices under Title 11 are issued by the clerk of the bankruptcy court or a person directed by the court. Significantly, under Section 78fff-2(a)(2), the SIPA claim is filed with the SIPA trustee, and is never filed with the bankruptcy court. Title 11 proofs of claim must be filed with the

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[9] It also neglects the fact that the disputed SIPA proof of claim was filed with the Trustee prior to the 1984 changes in the bankruptcy court system discussed, supra, and that, following enactment of BAFJA, petitioners clearly disputed the bankruptcy judge's authority to decide this case.

bankruptcy court pursuant to 11 U.S.C. § 501. Even the time limits for filing SIPA claims are different from those under Title 11. Indeed, it has been determined that "Congress contemplated and intended that certain provisions of the [Bankruptcy] Code not apply to SIPA cases." In re Government Securities Corporation, 95 B.R. 829 (S.D. Fla. 1988) (holding that Title 11 provisions permitting a bankruptcy judge to extend the time for filing a proof of claim, were not applicable to claims filed with the trustee in SIPA cases.)

Simply put, the claims process in a SIPA action is governed by SIPA and not by Title 11. Accordingly, a SIPA claim cannot be construed as a consent to the equitable jurisdiction of a bankruptcy court when (a) the SIPA claims process is not subject to the control and supervision of the bankruptcy

judge, and (b) the SIPA claim is not even filed with the bankruptcy court, but with a SIPA trustee.

2. The Court of Appeal's Ruling Unfairly Deprives Petitioners of any Opportunity to Have Their Private Rights Adjudicated by an Article III Tribunal.

The Court of Appeals upheld the district court's finding that petitioners violated the requirements of 11 U.S.C. § 329(a), which mandates disclosure of fees paid to an attorney representing a debtor. The Court of Appeals reasoned that "the disclosure requirements imposed by § 329 are 'mandatory not permissive'" and went on to state that "... an attorney who fails to comply with the requirements of § 329 forfeits any right to receive compensation for services rendered on behalf of the debtor". 4 F.3d at 1565; A42 - A43, citing In re Bennett, 133 B.R. 374, 378-379 (Bankr. N.D. Texas 1991).

The Court of Appeals held that "by violating § 329, the appellants forfeited any right to the fees received from IBI." 4 F.3d at 1566; A46. The result of this finding is that if petitioners wanted to ensure that their fees would not be subject to disgorgement under § 329, they should have filed the necessary disclosure with the bankruptcy court. However, by filing with the bankruptcy court, petitioners could be deemed, under Katchen v. Landy, 382 U.S. 323 (1966) and its progeny, to have submitted to the equitable jurisdiction of the bankruptcy court since it submitted itself to the process of allowance and disallowance of claims.

In effect, petitioners are caught in a "Katchen-22." That is, if they do not file a § 329 disclosure with the bankruptcy court, the bankruptcy court has the power to force

them to disgorge their fees. If they do file a § 329 disclosure with the bankruptcy court, according to the Court of Appeals, they subject themselves to the court's equitable jurisdiction and lose their Constitutional rights to a jury trial and to be heard by an Article III judge.

3. Even if Petitioners Have Filed a Proof of Claim, They are Entitled to Have an Article III Judge Hear and Determine Their Case.

The Court of Appeals concluded that "the bankruptcy court's determination of the trustee's preference and fraudulent conveyance claims did not violate Article III." 4 F.3d at 1561; A18 - A19. As support for this position, the Court of Appeals cited, inter alia, to this Court's opinion in Katchen v. Landy, 382 U.S. 323 (1966).

The issue in Katchen was characterized by this Court as follows: "Whether a

bankruptcy court has summary jurisdiction to order the surrender of voidable preferences asserted . . . by the Trustee in response to a claim filed by the creditor who received the preferences." 382 U.S. at 325. (Emphasis added.) This Court, in rejecting the creditor's argument that a finding in favor of summary jurisdiction would violate the Seventh Amendment right to trial by jury in actions at common law, reasoned that "since the proceedings of bankruptcy courts are inherently proceedings in equity, there is no Seventh Amendment right to a jury trial for determination of objections to claims . . . " 382 U.S. 336-337. (Citations omitted.)

The effect of Katchen is to convert legal claims into equitable claims as a part of the process of allowing claims, if the creditor has filed a proof of claim with the bankruptcy court. Thus, Katchen is a Seventh

Amendment case, which does not address a litigant's entitlement to have a private right tried by an Article III judge. As was noted by this Court in Marathon, and discussed in In re L.T. Ruth Coal Co., 66 B.R. 753 (Bkrtcy. E.D. Ky. 1986):

> In Katchen . . . there was no discussion of the Article III issue. Moreover, when Katchen was decided, the 1973 Bankruptcy Rules had not yet been adopted, and the District Judge, after hearing the report of the Magistrate [Referee], was free to "modify it or . . . reject it in whole or in part or . . . receive further evidence or recommit it without instructions."[10]

66 B.R. at 768, quoting Marathon, 458 U.S. at 79, n. 31. Significantly, then, at the time Katchen was decided, the district court essentially was permitted to review the

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[10] Katchen was decided under the Bankruptcy Act of 1898, which provided in Section 38 of such Act that any ruling by the bankruptcy referee was "subject always to a review by the [district court] judge."

findings of the bankruptcy referee de novo. Under the Tenth Circuit's ruling below, however, the protection of de novo review is eviscerated and petitioner's private right, as a "core proceeding," is deemed triable by a non-Article III judge, and is subject to reversal by an Article III judge only if the findings of fact are deemed "clearly erroneous."

As stated by the Court of Appeals:

> Accordingly, notwithstanding the fact that preferential and fraudulent transfer proceedings may involve private rights, we hold that the bankruptcy court had jurisdiction under Article III to adjudicate the trustee's suit.

4 F.3d at 1562; A22.

The Court of Appeals also supports its finding by relying on this Court's decision in Granfinanciera v. Nordberg, 492 U.S. 33 (1989), which, not unlike Katchen, also involved the issue of a Seventh Amendment

right to a jury trial. In Granfinanciera, this Court held that a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial under the Seventh Amendment when sued by a bankruptcy trustee for recovery of an allegedly fraudulent conveyance.

Granfinanciera likewise does not stand for the proposition that the filing of a proof of claim divests petitioners of their right to have an issue of private right adjudicated before an Article III judge. This Court stated as follows:

> . . . if a statutory cause of action such as respondents' right to recover a fraudulent conveyance under 11 U.S.C. §548(a)(2) is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court 'lacking the essential attributes of the judicial power.'

492 U.S. at 53. Granfinanciera and Katchen, as Seventh Amendment cases, simply do not

address fully the jurisdictional issue of whether petitioner is entitled to an Article III adjudication in equity and the Tenth Circuit improperly reads those decisions to deny petitioners an opportunity to be heard by an Article III tribunal.[11]

Similarly, this Court in Langenkamp v. Culp, 498 U.S. 42 (1990), again addressed the Seventh Amendment issue. In Langenkamp, this court, quoting Granfinanciera, held that "[a]ccordingly, 'a creditor's right to a jury

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[11] This Court, in Granfinanciera, explicitly refrained from addressing the extent of the constitutional authority for the bankruptcy courts to hold jury trials. 109 S.Ct. at 2802. Currently, there is a split of authority among the Courts of Appeals concerning whether bankruptcy courts can hold jury trials. Compare In re Baker & Getty Fin. Serv. Inc., 954 F.2d 1169 (6th Cir. 1992); In re Kaiser Steel Corp., 911 F.2d 380 (10th Cir. 1990); In re United Missouri Bank of Kansas City, N.A., 901 F.2d 1449 (8th Cir. 1990) (bankruptcy court cannot hold jury trial); with In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990), cert. denied, 498 U.S. 1 (1991).

trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate.'" 498 U.S. at 45. In Langenkamp, the creditor had submitted a bankruptcy proof of claim and was therefore denied the right to a jury trial.

The instant case goes one step further than Langenkamp. The Court of Appeals has denied debtor's counsel the right to an Article III adjudication of its a private right, by construing Section 329 as depriving a debtor's attorney automatically of such right, notwithstanding the fact that the attorneys, here, did not file a disclosure under that statute. The Court of Appeals substantiates its reasoning by noting:

> Although the bankruptcy court could have ordered the appellants to disgorge the payments it received . . . directly under § 329, we do not believe the bankruptcy court

> abused its authority in reaching the same result by using § 329 as a basis for approving the trustee's claims under §§ 547 and 548. 4 F.3d at p. 1566; A46 - A47.

The SIPA trustee attacked the payments to petitioners as being voidable under Sections 547 and 548. Sections 547 and 548 govern the recovery of preferences and fraudulent conveyances, respectively. This Court's ruling in Granfinanciera makes clear that these actions are matters of private right, despite Congress' "taxonomic" classification of these proceedings as core. 492 U.S. at 61. The mere fact that Section 329 may also have governed those payments does not bear on the bankruptcy court's authority to adjudicate the alleged preferential and fraudulent transfers.

While the bankruptcy court may be at liberty to pursue whatever sanction it might consider appropriate for lawyer non-compliance with Section 329, it should not be permitted to use that section as a basis for adjudicating a private right over which it would not otherwise have jurisdiction.

In sum, this petition presents important questions concerning petitioners' right to be heard before an Article III court. Petitioners' filing of a SIPA proof of claim with the SIPA trustee ought not be interpreted to confer jurisdiction of petitioners' "private rights" upon a bankruptcy court. This is particularly so where the requirements of 11 U.S.C. § 329 (and other statutory provisions) would constantly place litigants in peril of abandoning critical Constitutional rights.

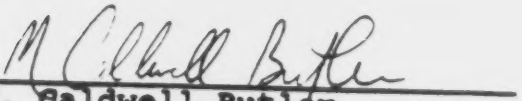
The cases relied on by the appellate courts, which address the filing of proofs of claims with the bankruptcy court as waiver of Seventh Amendment rights, pertain to the litigant's consent to proceed in equity. They do not suggest that such a filing constitutes abandonment of the litigant's rights to be heard by an Article III judge. This petition squarely presents that question to this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GILBERT K. DAVIS AND
DAVIS, GILLENWATER & LYNCH



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CERTIFICATE OF MAILING

I, M. Caldwell Butler, do hereby certify that I mailed prepaid, a true and correct copy of the foregoing on this the 14 day of December, 1993 to the following: Mr. Theodore H. Focht, Ms. Josephine Wang, Mr. Michael E. Don, counsel for Securities Investor Protection Corporation, Office of General Counsel, 805 15th Street, N.W., Suite 800, Washington D.C. 20005-2207; and Ms. Adrienne H. Benavidez, Ms. Maria J. Flora Gorsuch, Kirgis, Campbell, Walker & Grover, counsel for James H. Turner, Trustee, 1401 17th Street, Suite 1100, P.O. Box 17180, Denver, CO 80217.0180.

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